United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1372

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1372

Bl/s

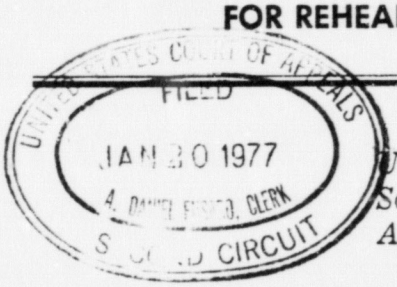
UNITED STATES OF AMERICA,
Appellant,

—v.—

REGINALD SATTERFIELD,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*



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PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

Preliminary Statement

The United States of America respectfully petitions for rehearing, and suggests rehearing *in banc*, of the opinion of a panel of this Court (Smith, Oakes and Timbers, J.J.), filed December 7, 1976, affirming two pre-trial orders of the United States District Court for the Southern District of New York (Knapp, J.), suppressing Satterfield's post-arrest statements on the ground that the defendant had not adequately waived his right to counsel. *United States* v. *Satterfield*, Dkt. No. 76-1372, slip. op. 805 (2d Cir., Dec. 7, 1976).

Statement of the Case

The United States appealed, pursuant to Title 18, United States Code, Section 3731, from two pre-trial orders of the Honorable Whitman Knapp, United States District Judge for the Southern District of New York, suppressing three statements of Reginald Satterfield as evidence at trial.

On October 19, 1976, a panel of this court heard oral argument. On December 7, 1976, the panel affirmed the District Court's orders suppressing the three statements. The panel's affirmance was based on a finding that the government had not met the "heavy burden" of showing that Satterfield had knowingly and intelligently waived his Sixth Amendment rights. Slip op. 807.

In the findings of fact filed by the District Court, adopted in part by the panel in its opinion, the following facts appear. Two days after Satterfield was indicted on April 14, 1976, for various narcotics violations, he was arrested pursuant to a warrant by agents of the Drug Enforcement Administration ("DEA").

The agents informed Satterfield that he had been indicted and advised him of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which Satterfield, a 35-year-old college graduate, stated he understood. Satterfield was then taken to DEA headquarters where he made a statement essentially admitting his role in the significant heroin distribution activities charged in the indictment. Later on the same day, Satterfield was taken to the United States Attorney's Office where he was again informed of the indictment and warned of his *Miranda* rights, and he again made an incriminating statement, and agreed to cooperate with the Government and provide information about narcotics activities. Satterfield was then arraigned before a United States Magistrate and was released on a personal recognizance bond. On the following Monday, three days after his arrest, Satterfield voluntarily returned to DEA headquarters. Satterfield was again advised of his *Miranda* rights and again made an incriminating statement.*

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* In its original brief, the Government argued that since Satterfield volunteered this statement, it was admissible under *United States* v. *Gaynor*, 472 F.2d 899 (2d Cir. 1973), and related cases, irrespective of the admissibility of the other statements. The panel did not address this contention.

Prior to trial, Satterfield moved to suppress these statements. After a hearing, Judge Knapp first ordered that the first two statements be suppressed because Satterfield was not sufficiently in control of himself to be able to waive his rights, thus rendering the statements involuntary. After a petition for reargument was filed by the Government, however, the Court *specifically withdrew* its initial factual findings that the statements had been involuntary and found, quite to the contrary, that Satterfield fully understood his rights as they were explained to him, and knowingly waived them.* Rather, Judge Knapp suppressed all three statements on an avowedly "new" rule that once a defendant has been indicted, he simply cannot waive his right to counsel unless a government agent affirmatively tries to persuade him of the "foolishness" of doing so.

The Government appealed to this Court, arguing that numerous precedents in this Circuit supported our position that *Miranda* warnings provided an adequate basis for Satterfield to waive his right to counsel, and alternatively, that even if there were a "higher standard" to be applied to post-indictment interviews, that standard was met in this case since Satterfield was specifically informed of his indictment. On appeal, a panel of this Court affirmed Judge Knapp's ruling, although for rea-

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* There appears to be considerable doubt whether the panel even considered this second memorandum opinion of Judge Knapp, since the panel adopted the set of facts found by the judge in the first opinion without even mentioning that many of those facts were specifically withdrawn in the second, after the Government could be heard on the matter. For example, the panel's opinion refers to the "order" of the District Court, slip op. at 806, while in fact there were two. Further, the panel refers to the publication of Judge Knapp's *first* memorandum in the Federal Supplement at 417 F. Supp. 293, see slip. op. at 807, while the second opinion, which was not referred to, is printed separately, after the publication of other matter, at 417 F. Supp. 303. To the extent that the panel may have based its decision on such an oversight, it may wish to revise its opinion on this ground alone.

sons which—while not altogether clear to the Government—do not appear to be the same as those adopted by Judge Knapp. The panel did not even advert to the existence of Judge Knapp's second findings of fact, 417 F. Supp. 303 (made after the Government's request for reargument), but, apparently referring to the *first* findings, wrote that the District Court "paints a picture of an individual distraught, upset, weeping and obviously out of control at the initial questioning, still in great need of help at the later interview." Slip op. 808. The panel then held that, under *Massiah* v. *United States*, 377 U.S. 201, 206 (1964), the Government must meet a "higher standard" of voluntariness with respect to post-indictment statements than with respect to interviews prior to indictment, and that, while that "higher standard" was never described, the Government did not do so in this case. In so holding, the panel "distinguished" numerous precedents cited by the Government for the proposition that statements made after warnings meeting the *Miranda* test are admissible, even if the Sixth Amendment right to counsel has attached.

Reasons for this Petition

The panel's decision in this case should be reheard, preferably by an *in banc* court, for two reasons.

First, the standard for determining the admissibility of post-indictment statements apparently * adopted by

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* We say "apparently" because the intent of the Court is unclear to us. To the extent that the panel intended to rely on the fact—largely unique to this case—that Satterfield was emotionally upset at the time of his first interview, the decision may not have the deleterious precedential impact we fear, although we submit that basing the decision on findings of fact subsequently modified by the finder of fact is itself improper. Our principal concern, however, is with the legal standard apparently set forth on pp. 804-08 of the slip opinion, which we submit is unprecedented and erroneous.

the Court is one of crucial and continuing significance to the administration of justice in this Circuit. Such interviews are common, and thus pronouncements of this Court on the subject will be watched with great care by the District Courts in the Circuit.* Particularly since *all* of the district judges other than Judge Knapp who had ruled on the issue had adopted the views argued by the Government ** and since the Courts of Appeals for the other circuits had similarly ruled with virtual unanimity,*** we respectfully submit that such radical changes in the law should be approached with great care.

Second, as we will demonstrate in the Argument section of this petition, each of the logical steps taken by the panel in this case is squarely refuted by established precedent in this Circuit. In short, the holding of the panel in this important case is simply wrong.

ARGUMENT

The Decision of the Panel in this Case is Incorrect.

In affirming Judge Knapp's ruling that, notwithstanding the voluntariness of Satterfield's statements and the

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* For example, Judge Knapp has apparently interpreted the panel's affirmance of his decision to endorse all of the views included in his memoranda, and has subsequently suppressed, on the basis of his own decision, statements that were voluntarily made by a defendant not under any emotional stress. *United States* v. *Griffen*, 76 Cr. 938 (WK) (Dec. 22, 1976). See also the front page coverage of the panel's opinion in N.Y. Law Journal, Vol. 176, No. 113, December 14, 1976.

** See *e.g.*, *United States* v. *Weingarten*, — F. Supp. — (S.D. N.Y. 1976) 76 Cr. 773 (Sept. 29, 1976, MacMahon, *J.*); *United States ex rel. Wooden* v. *Vincent*, 391 F. Supp. 1260, 1263 (S.D.N.Y. 1974) (Duffy, *J.*). In addition, an informal poll of Assistant United States Attorneys in this District has reported numerous other *unreported* decisions of district judges adopting the Government's view, and *none* adopting those of Judge Knapp.

*** The positions of other circuits on this issue are reported at p. 13 of our original brief.

adequacy of the *Miranda* warnings repeatedly given to him * the confessions should nonetheless be suppressed, the panel reached three interrelated conclusions. First, it purported to find in precedents in this Circuit the proposition that after the right to counsel has attached ** the Government must satisfy a "higher standard" of voluntariness than those set forth in *Miranda* itself. Second, it "distinguished" numerous decisions in this Circuit cited by the Government for the contrary proposition. And third, it held that whatever the "higher standard" was, it was not met in this case. Each of these conclusions—all of which were necessary to affirm Judge Knapp's ruling—were incorrect.

The starting point of the panel's—and of Judge Knapp's—analysis is that *Massiah* v. *United States*, *supra*, governs this case. See slip op. at 807. As the Government pointed out in its earlier brief, however, this Circuit has always applied the *Massiah* decision only to the facts prompting the decision itself—that is, the surreptitious, and thus unwaived, interference with the right to counsel. See *United States* v. *Cohen*, 358 F. Supp. 112 (S.D.N.Y.), *rev'd on other grounds*, sub nom. *United States* v. *Huss*, 482 F.2d 38 (2d Cir. 1973), and cases there cited. Indeed, as recently as this Term this Court distinguished *Massiah* on precisely this ground. *United States* v. *Chong*, Dkt. No. 75-1435, slip op. 5745, 5746 (2d Cir. Sept. 27, 1976). The only other decision cited by the panel in

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* Judge Knapp specifically noted that all the Government agents involved conducted themselves in "an exemplary fashion." 417 F. Supp. at 297.

** We would like to emphasize that the Government obviously does not dispute—and never has disputed—the clear fact that under *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972), the Sixth Amendment right to counsel had "attached" at the time of Satterfield's indictment. That decision, however, is of no use in determining if and how that right may be waived. Our position is that under *Kirby* the *same* right had *equally* attached in *United States* v. *Diggs*, 497 F.2d 391 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974), and the other decisions discussed below, and that the standards for measuring the waiver of the Sixth Amendment rights in those cases must apply here as well.

support of its ruling is the dissenting opinion of Judge Friendly in *United States* v. *Massimo*, 432 F.2d 324, 327 (2d Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971). As indicated in the margin,* Judge Friendly's remarks, when viewed in their entire context, simply do not establish a legal standard for this question. More importantly, of course, Judge Friendly's opinion was a dissenting one, and had never commanded a majority of any panel of this Court.** The panel's reliance on the dissent is all the more surprising in view of the recognition by the author of the dissent himself of subsequent law in this Circuit that is totally inconsistent with it, see *United States* v. *Duvall*, 537 F.2d 15, 21 (2d Cir.), *cert. denied*, — U.S. — (1976). In short, the panel's decision was simply and literally unprecedented.***

Secondly, and more significantly, we submit that the panel's attempts to "distinguish" the precedents upon which the Government relied are inaccurate, and at best extraordinarily disingenuous. In *United States* v. *Chong*, *supra*, slip op. at 5745-46; *United States* v. *Barone*, 467

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*It is interesting that in quoting from Judge Friendly's opinion, the *Satterfield* panel simply eliminates, and substitutes with an elipsis, Judge Friendly's remarks that *Miranda* warnings "*would not necessarily* meet what *I* regard as the higher standard. . . ." Clearly, Judge Friendly was only stating his own view a question of policy, and did not even purport to declare the law in this circuit.

**The *Massimo* majority opinion, which rejected Judge Friendly's views, was written by Judge Smith, who also authored the panel's opinion in this case.

***The *Satterfield* panel did *not* cite or rely on one of the principal bases of Judge Knapp's decision, that is, Judge Frankel's opinion in *United States ex rel. Lopez* v. *Zelker*, 344 F. Supp. 1050 (S.D.N.Y.), *aff'd without opinion*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1049 (1972). This was probably because Judge Smith in *United States* v. *Diggs*, 497 F.2d 391 (2d Cir.), *cert. denied*, 491 U.S. 861 (1974), had specified that the summary affirmance of *Lopez* was without precedential value. See *United States* v. *Duvall*, *supra*, 537 F.2d at 21.

F.2d 247 (2d Cir. 1972), and *United States* v. *Diggs*, 497 F.2d 391 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974), this Court held that defendants who were advised of their *Miranda* rights could validly waive their rights to counsel *even after the right to counsel had attached.* The panel distinguished these cases on the ground that the defendants had not yet been indicted. We submit that this difference simply does not deal with the basic problem, and if anything provides a more difficult situation in which to find a waiver. As is clear from each of the opinions in those cases, and from the decision in *Kirby* v. *Illinois*, *supra*, the Sixth Amendment right to counsel had in each of the cited cases indisputably attached, just as firmly as if the defendant had been indicted. To hold—totally without explanation—that a defendant can waive that right in one situation but not in the other is not only without basis in logic, but is a dubious policy. Indeed, we submit that it is far more significant and potentially dangerous to speak with a defendant after the attorney-client relationship has already been established, than merely to interview him after the formal accusatory document has been filed. Thus, particularly when one looks beneath the surface of the cases cited by the Government, those cases—and particularly *Diggs*—control this case.*

The panel further "distinguished" the Court's decision in *United States* v. *Reed*, 526 F.2d 740 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976), where the statements made by an *indicted* defendant, after receiving *Miranda* warnings, were found admissible, on the ground that the fact of his being under indictment at the time of the statement was not mentioned *in the opinion.* As we pointed out in our original brief, this approach is essen-

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* It should be noted that while the Government brought the *Diggs* decision to the attention of Judge Knapp, he never even attempted to distinguish it from the facts of this case, and certainly not on the ground adopted by the panel.

tially ostrich-like, since the fact of the indictment did appear in the briefs before this Court, and the Court's citation of *Diggs* as controlling, rather than any of thousands of cases dealing simply with the sufficiency of *Miranda* rights, clearly indicates that it was aware of the issue presented.* Furthermore, this "distinction" of *Reed* is inapplicable to this Court's resolution of precisely the same issue in the very recent decision of *United States* v. *Armedo-Sarmiento*, Dkt. No. 76-1113, slip op. 305 (October 28, 1976), filed even after our brief in this case. In that case, the fact that a defendant was under indictment at the time of an interview was clear from the opinion, see slip op. at 311. Nonetheless, the Court held that a waiver of his constitutional rights after receiving *Miranda* warnings was valid. *Id.* at 315-16. Thus, even though *United States* v. *Reed* is itself precisely on point, the attempted distinction fails to distinguish a later decision reaching the same result. In short, controlling precedent in this Circuit support the Government's position in this case, and the attempts to "distinguish" those decisions are inaccurate.

Finally, it should be noted that despite the fact that any new ruling in this area may have extraordinary precedential effect, the panel never even attempts to elucidate what "higher standard" will now be required in post-indictment interviews. We submit that the only reasonable "higher standard," and certainly the only such standard that finds any precedential support, is

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* It is, we submit, a matter of more than mere irony that the claimed infirmity of *Reed* as precedent—that the fact the defendant was under indictment, did not appear in the opinion—is also true of *United States* v. *Massimo, supra*, upon the dissenting opinion of which the panel primarily relies! Indeed, our review of the briefs makes it clear that Massimo was in fact *not* under indictment at the time he made the questioned statement, and thus Judge Friendly's view that higher standards should govern "when the Sixth Amendment has attached", 432 F.2d at 32, must have been explicitly rejected in *Diggs*, and at any rate, *under the majority's own analysis*, simply cannot control this case.

that the defendant must be told, in addition to the rights specified in *Miranda*, that he is under indictment—that is, that formal charges have already been filed. The writer of the *Massimo* dissent—the purported genesis of the panel's ruling—adverted to this standard in *United States* v. *Duvall*, *supra*, 537 F.2d at 21, and certainly no more stringent standard appears in any Second Circuit decision.* As the panel itself acknowledges, slip op. at 806, this standard was met in this case. Thus, even if the Court adopts the standard suggested by Judge Friendly, the facts of this case met that standard. At least, we submit, given the great effect the decision will have on practices and precedents in the Circuit, the panel simply should not announce an even higher standard without explaining what that standard is.

CONCLUSION

The orders of the District Court should be reversed.

Respectfully submitted,

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* Judge Knapp ruled that the Government must affirmatively attempt to dissuade a defendant from speaking, and should point out the "foolishness" of doing so. (App. 109). As we indicated in our original brief, this is not only totally unprecedented (as Judge Knapp admitted), but also contradicts and undermines the quite logical language in *Miranda* that the very purpose of the *Miranda* warnings is to "make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." 384 U.S. at 469.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT J. COSTELLO, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of January, 1977, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Lawrence K. Feitell
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And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Robert J. Costello
ROBERT J. COSTELLO

Sworn to before me this
20th day of January 1977
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Notary Public, State of New York
No. 24-0545340
Qualified in Kings County
Commission Expires March 30, 1977